KEWANGAN USAHA BERSATU BHD.

v.

MAKOK DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[NO. 24(31)-4109 OF 1986]
14 MARCH 1990

CIVIL PROCEDURE: *Ex parte order for sale - Cause to the contrary functus officio - Ex parte hearing vs. ex parte application - Absence of party although notified of hearing - Rules of the High Court 1980, O. 28 r. 4(1).*

CONTRACT: *Conduct or representation - Principles - Words and conduct - Binding - Reliance on these words and conduct.*

The defendant chargor, M, took a loan from the plaintiff chargee K, and executed a memorandum of charge on the land as security. As a result of M's failure to make the necessary repayments a notice in form 16D was issued by K. M entered into negotiations with D, an authorised representative of K, for amicable settlement of the matter.

On 11 March 1987, K instructed its solicitor to temporarily withhold all proceedings against M who on 25 March 1987, made a lump sum payment of RM1.3 million by off setting monies belonging to a sister company of M's, P, which had an account with K.

On 11 September 1987, K's solicitors issued another letter of demand to M; as no further payment was made, K proceeded with its originating summons. At the hearing date of 26 February 1988, neither M nor its solicitors were present. The Court granted K's summons and fixed a date for auction of the land. The matter then came up before the Senior Assistant Registrar (SAR) on 13 August 1988 for the fixing of the reserve price and auction - neither M nor its solicitor were present. The auction, after various adjournments, was scheduled for 2 February 1989.

On 27 January 1989, M by way of summons-in-Chambers, applied to set aside the SAR's order of 13 August 1988 and a plea for stay of execution was also made.

M contended firstly that the statutory notice in form 16D issued by K on 3 October 1986 was invalid and secondly that K should be estopped from proceeding with the auction of the land as negotiations had been entered between the parties.

M stated that after the second letter of demand dated 11 September 1987, there had been further negotiations between the parties; further that the general manager of K had assured M that no action would be taken as M had made the lump sum payment. K also agreed to grant additional facilities to S.

K contended that there was no express or implied representation made to M that legal proceedings would be withdrawn and also that the letter of 11 September 1987 was a mere reminder and not a fresh letter of demand.

The Court had to decide whether the Court is *functus officio* once an order of sale has been perfected and whether K was estopped by its conduct of representation.

Held:

[1] (a) Under O. 28 r. 4(1) of the Rules of the High Court 1980 (RHC), the Court was not *functus officio* but had full powers to vary or revoke the order of sale if it deemed fit to do so.

(b) An application (which had been served on the other party) heard in the absence of a party is not an *ex parte* application; it is the hearing which is *ex parte* and an order made on such a hearing is an *ex parte* order within the terms of O. 28 r. 4(1) of RHC.

[2] (a) Based on the equitable doctrine of estoppel by conduct or representation, K cannot be allowed to go back on what its general manager had said and done when it would be unjust or inequitable for it to do so;

(b) the general manager of K is its authorised representative and his words and conduct must bind K and K must be precluded from applying for an order for sale, which it has deliberately declared its intention of rejecting.

[3] (a) The general manager of K did not deny that there had been negotiations leading to the parties reaching agreement;

(b) The mere statement that there was no express or implied representation is rejected because by his conduct and representations, the general manager clearly manifested to M that K would not proceed with its application for an order of sale and would negotiate for restructuring of the loan; as a result, M had proceeded to pay a substantial sum to K.

[M's application granted; SAR's order of 13 August 1988 set aside.]

Cases referred to:

Birmingham and District Land Company v. London & North Western Railway Company [1889] 40 Ch D 268
Hughes v. Metropolitan Railway Co. [1877] 2 AC 439
Industrial & Commercial Realty Co. Ltd. v. Merchant Credit Pte. Ltd. [1980] 1 MLJ 208
Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Anor [1989] 1 CLJ (Rep) 1
Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 CLJ (Rep) 384
Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd. [1985] CLJ (Rep) 8
Sim Siok Eng v. Government of Malaysia [1978] 1 MLJ 15
United Malayan Banking Corpn. Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd. [1988] 2 CLJ (Rep) 522

Legislation referred to:

National Land Code 1965, s. 256(3)
Rules of the High Court 1980, O. 28 r. 4(1)
Rules of the Supreme Court [Sing], O. LIII r. 4(1)

For the plaintiff - Shanty Thuraisingham; M/s. Kadir, Tan & Ramli
For the defendant - K. Narayanan; M/s. Riza, Leong & Partners

JUDGMENT

Lim Beng Choon J:

In the present case Makok Development Sdn. Bhd. (the chargor) was and still is the registered owner of the land held under Geran No. 5375 (First Grade) Lot No. 314 Sek. 13, Bandar George Town, Daerah Timor Laut (the land). On or about 19 June 1984 the chargor took a loan of RM3,500,000 from Kewangan Usaha Bersatu Bhd. (the chargee) and in consideration thereof, the chargor executed a memorandum of charge on the land in favour of the chargee as

security for all sums of money advanced by the chargee to the chargor to the extent of RM3.5 million for the principal sum and for interest at the rate of 14.5% p.a. with monthly rests. The charge was duly registered in the Land Registry of Pulau Pinang on 20 July 1984. The chargor failed to make the necessary repayments with interests pursuant to the terms of the memorandum of the charge. The chargee through its solicitors, therefore, caused a notice in Form 16D of the National Land Code (the NLC) to be issued on 3 October 1986 to the chargor specifying the breach in question and requiring the chargor to remedy the breach within seven days from the date of the receipt of the said notice. The chargee failed to respond to the said notice and consequently the chargee instituted this action by way of originating summons on 10 December 1986 claiming among other things for an order for sale of the land by public auction to satisfy the sum of RM4,310,764.64 with further daily interest at RM2,096.35. The originating summons was duly served on 2 March 1987. The chargor did not file a memorandum of appearance; neither did it file any affidavit in defence against the chargee's claims. Instead, the chargor's authorised representative, one Dato' Mak Kok, negotiated with the chargee's representative to settle the matter amicably. Pursuant to the said negotiation the chargee wrote to its solicitors on 11 March 1987 instructing them to withhold all proceedings against the chargor and to keep the matter in abeyance until further notice. The letter was carbon copied to the chargor. On 25 March 1987 the chargor made a lump sum payment of RM1,318,018.23 by off setting moneys belonging to a sister company of the chargor namely M/s. Metropolitan Properties Sdn. Bhd. which had an account with the chargee. On 11 September 1987 the chargee through its solicitors issued another letter of demand requiring the chargor to pay the outstanding principal sum standing at RM3,692,729.58 with interest amounting to RM190,229. No further payment was made to the chargee and on 27 October 1987 the chargee filed in a notice of appointment to hear the present originating summons. It was filed for hearing on 26 November 1987 and it was duly served on the chargor. The said hearing was adjourned on 26 November 1987 to 26 February 1988 and the new date of hearing of the case was conveyed to the chargor. At the hearing of the originating summons on 26 February 1988 neither the chargor's representative nor its solicitors had turned up for the hearing and this Court duly made an order in terms of the originating summons and the date of the auction of the land was fixed on 26 August 1988 which was later adjourned to 5 December 1988. Directions were obtained from the Senior Assistant Registrar (SAR) of this Court pertaining to the fixing of the reserve price at RM5.2 million and the appointment of an auctioneer as well as the conducting of the auction sale of the land. Again neither the chargor's representative nor its solicitors appeared before the SAR when directions were obtained from her on 13 August 1988. It is not clear as to why the auction was not carried out on 5 December 1988. However that may be, a new date for the auction was obtained and the auction was due to take place on 2 February 1989.

On 27 January 1989 the chargor applied by way of summons-in-Chambers (encl. 15) to set aside the order for the sale by public auction of the land granted by this Court on 13 August 1988. A plea for a stay of the auction was also made. In its affidavit in support of its application affirmed by its managing director on 27 January 1989 (encl. 16) a number of issues were raised but at the hearing of its application Counsel for the chargor relied on only two issues namely:

(i) in view of the circumstances of the case whether the statutory notice in form 16D issued by the chargee on 3 October 1986 was still valid; and

(ii) again in view of the circumstances of the case whether the chargee is not estopped from proceeding with the auction of the land.

The grounds relied on by the Counsel for the chargor are as set out in encl. 16, the affidavit in support of the chargor's application and they are as follows:

Upon receiving the originating summons in the present case, the managing director had on behalf of the chargor negotiated with the representative of the chargee to settle the matter amicably. Pursuant to the said negotiation the chargee thereupon wrote to its solicitors on 11 March 1987 instructing them to withhold all proceedings and keep the matter in abeyance until further notice. A copy of the said letter was sent to the chargor's managing director. As a result of the negotiation the chargor made a lump sum payment of RM1,318.018.23 by off setting money belonging to a sister company of the chargor, M/s. Metropolitan Properties Sdn. Bhd. which had an account with the chargee. It was also agreed by the parties that the chargee would restructure the loan. On 11 September 1987, the chargee, however, through its solicitors had issued a fresh letter demanding the total outstanding which at that point of time stood at RM3,692,729.58 inclusive of interests. Upon receipt of that letter the managing director of the chargor once again approached the general manager and the assistant general manager of the chargee to propose a restructuring of the outstanding loan. It was claimed that the two representatives of the chargee agreed to allow Sineo Holdings Sdn. Bhd. to buy over the land and it was further agreed that the chargee would grant additional facilities to Sineo Holdings Sdn. Bhd. Despite what had been agreed, the chargee still proceeded with this proceeding to sell the land by auction. Upon receipt of a letter dated 30 October 1987 informing the chargor that the hearing of this originating summons had been set down on 26 November 1987, the said managing director personally spoke to the general manager of the chargee who assured him that it was a mere formality and that the chargee would not take any action as the chargor had earlier made a lump sum payment. Notwithstanding this assurance the chargee proceeded to obtain an order for sale from this Court dated 26 February 1988.

In response to the chargor's allegations, the chargee filed in a affidavit in reply affirmed by its general manager on 13 March 1989 (encl. 19) in which it was stated that "there was no express or implied representation by the chargee to the chargor that legal proceedings against them would be withdrawn and discontinued altogether or at all". It was further stated that the letter dated 11 September 1987 sent by the chargee's solicitors demanding payment of RM3.5 million comprising of the capital sum and RM190,229.56 being the aggregate interest arising therefrom was a mere reminder and not a fresh letter of demand. Alternatively the chargee claimed that since the statutory notice had been sent to the chargor the said letter "was superfluous and of no legal consequence." As regards to the transaction of the chargee with Sineo Holdings, the chargee said that it was "a separate and distinct issue altogether and has no bearing nor contention with the present case." In any event, said the chargee, the chargor should have sent its representative and its solicitors to appear in Court at the hearing of this originating summons and "request for a postponement." It also claimed that there had been full compliance with the provisions of the National Land Code and the Rules of High Court 1980 on the part of the chargee and hence the chargor has no ground to complain.

In dealing with the present case the first point I have to decide is whether this Court is *functus officio* once the order of sale has been perfected and so the chargor's remedy is by way of appeal to the Supreme Court. In this connection the Counsel for the chargor drew my attention to the case of *United Malayan Banking Corpn. Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd.* [1988] 2 CLJ (Rep) 522. In that case the plaintiff had also obtained an *ex parte* order for sale of the property in question and the defendant subsequently applied by way of summons-in-chambers to set aside the order. In holding that the Court is not *functus officio* Edgar Joseph Jr. J said:

In reply, Counsel for the defendant contended that an order made on an originating summons, even though duly served on a defendant, who fails to enter an appearance and is absent at the hearing is, nevertheless, an *ex parte* order. My attention was drawn to the Singapore Court of Appeal case of *United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd.* where Chua J, delivering the judgment of the Court, said this:

The first question for consideration is whether or not the order made on the originating summons was an *ex parte* order and comes within O. LIII r. 4(1).

The originating summons in this case was served on Tay Soo Tong by substituted service and he had made no appearance and in such a case O. LI r. 16 provides:

> where any party who had been duly served fails to attend at the time appointed for the hearing, the Judge may proceed *ex parte*, if he thinks it expedient to do so, and may require such evidence of service as he thinks fit.

It is clear then that a Judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and an order made on such a hearing is an *ex parte* order within the terms of O. LIII r. 4(1).

Order LIII r. 4(1) of the Singapore Rules of the Supreme Court, then in force, was as follows:

> Any order made *ex parte* may be varied or set aside on application, by any person affected by it, to a Judge, on such terms as to costs or otherwise as to the Judge seems fits.

The relevant Singapore rule would thus seem to be generally in *pari materia* with O. 28 r. 4(1) of our Rules of the High Court 1980, which provides:

> The Court by whom an originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing, the order may be varied or revoked by a subsequent order of the Court on such terms as it thinks just.

On this basis, it was argued that the defendant's application was perfectly competent and the Court was not *functus officio* but had full powers to vary or revoke the order of sale if it deemed fit to do so having regard to the provisions of O. 28 r. 4(1) of the Rules of the High Court 1980.

With respect, I agree with what have been said by my brethren Edgar Joseph Jr. J and I adopt the same approach to the present case. In any event in the further affidavit of the chargor affirmed by its managing director on 14 August 1989, it was said that although the chargor was served with this originating summons, the affidavit in support was never served on the chargor. In the circumstances I agree that the order of this Court dated 26 February is irregular. I should also mention that the Counsel for the chargee did not, at the hearing of the application of the chargor, make an issue on this point.

I shall now turn to the merits of the case. In dealing with this matter I must bear in mind the provisions of subs. (3) of s. 256 of the National Land Code which are as follows:

> (3) On any event such application the Court shall order the sale of the land or lease to what the charge relates **unless it is satisfied of the existence of cause to the contrary.** (Emphasis is mine).

The words in the said subsection (3) emphasised by me have been considered by the then Federal Court in *Kheng Soon Finance Bhd. v M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 MLJ 384 where Salleh Abas CJ (Malaya) said at p. 388:

> It is clear that notwithstanding the proof of default by a chargor the chargee is not automatically entitled to an order to sale nor would the Court without scrutiny allow his application. The Court must decide whether there are circumstances in the case before it which would amount to a "cause to the contrary" within the meaning of subsection. (3) which would be sufficient in its opinion to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved.

Although the judgment of the Federal Court was subsequently reversed by the Privy Council, the English Law Lords however accepted the principle laid down by the Chief Justice (Malaya) relating to the construction of subsection (3) of s. 256 of the National Land Code. Thus Lord Oliver of Almerton, in delivering the judgment of the *Keng Soon Bhd.* case as reported in [1989] 1 CLJ (Rep) 1, said at p. 4:

> Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the Court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

Reverting to the two issues raised by the Counsel for the chargor it is appropriate that I should deal with the estoppel issue first simply because should I find that the chargee is estopped from proceeding with the auction the question relating to the validity of the statutory notice in Form 16D issued by the chargee on 3 October 1986 will be effectively answered.

The equitable principle governing the doctrine of estoppel by conduct or representation was stated by Lord Cairns in the leading case of *Hughes v. Metropolitan Railway Co.* [1877] 2 App. Cas. 439 at 448 in these words:

> it is the first principle upon which all Courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

The case was followed and applied in *Birmingham and District Land Company v. London 4 North Western Railway Company* [1889] 40 Ch. D. 268 where Bowen LJ elaborating on the principle stated that:

> if persons who have contractual rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of equity of enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.

The equitable principle laid down in the two English cases cited above was applied by the Federal Court in *Sim Siok Eng v. Government of Malaysia* [1978] 1 MLJ 15 at 19. In the Singapore case of *Industrial & Commercial Realty Co. Ltd. v Merchant Credit Pte. Ltd.* [1980] 1 MLJ 208 at 209 Choor Singh J cited the following passage by Lord Denning in his book, the Discipline of the Law at p. 217:

Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J put in these words:

> The principle upon which estoppel *in pais is* founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept, for the purpose of their legal relations.

Applying the equitable principle expounded by the Judges in the cases cited above to the present case, it is distinctly clear that the chargee cannot be allowed to go back on what its general manager had said and done when it would be unjust or inequitable for it to do so and I say so for these reasons. Upon receiving the originating summons the managing director of the chargor approached the said general manager to negotiate for an amicable settlement. Pursuant to the negotiation two things took place namely (i) the chargee thereupon wrote to its solicitors instructing them to withhold all proceedings and keep the matter in abeyance until further notice and (ii) the chargor thereafter made a lump sum payment of RM1,318,018.25 which was accepted by the chargee. Upon payment of that sum it was further agreed that the chargee would restructure the loan. The restructuring of the loan was reaffirmed by the general manager of the chargee when approached by the managing director of the chargor upon receipt of the letter of demand dated 11 September 1987 written by the chargee's solicitors. The chargor even agreed to allow Sineo Holdings Sdn. Bhd. to buy over the land and that the chargee would grant additional loan facilities to this company. Further assurance was given by the general manager of the chargee one month before the hearing of the original summons. As I have no doubt that the general manager of the chargee is its authorised representative, his words and conduct must bind the chargee. It is to be noted that the said general manager in his affidavit (encl. 19) had not denied that the aforesaid negotiations leading to the parties reaching the agreements adumberated above did take place. He merely said that there was no express or implied representation by the chargee to the chargor that legal proceedings against the latter would be withdrawn or discontinued. Such statement is best expressed and be rejected simply because by his conduct and representations he clearly manifested to the chargor that the chargee would not proceed with its application for an order for the sale of the land and would agree to restructure the loan. The chargee now wishes to go back on that assurance. It is impossible to avoid the conclusion that the assurance is binding on the chargee. Taking a view most favourable to the chargee I would say that the assurance can only be terminated by the chargee upon it giving reasonable notice and this the chargee has failed to do. Furthermore by its conduct and representations, the chargee has elected not to proceed with its application for an order for the sale of the land by public auction and instead to negotiate with the chargor to restructuring the loan. Pursuant to this assurance the chargor had gone on to pay a substantial sum to the chargee. In such circumstances the chargee must be precluded from resorting to the course which it has deliberately declared its intention of rejecting - see *Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd.* [1985] CLJ (Rep) 8 at 11.

For the reasons stated above I would grant an order in terms of the application of the chargor. The order of this Court dated 13 August 1988 allowing the chargee to sell the land by public auction is set aside with costs.

Also found at [1991] 1 CLJ 760